No. 14041

United States Court of Appeals

for the Ninth Circuit.

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeals from the United States District Court, for the District of Montana,

FILED

OCT 28 1953

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-23-53

PAUL P. O'BRIEN
CLERK

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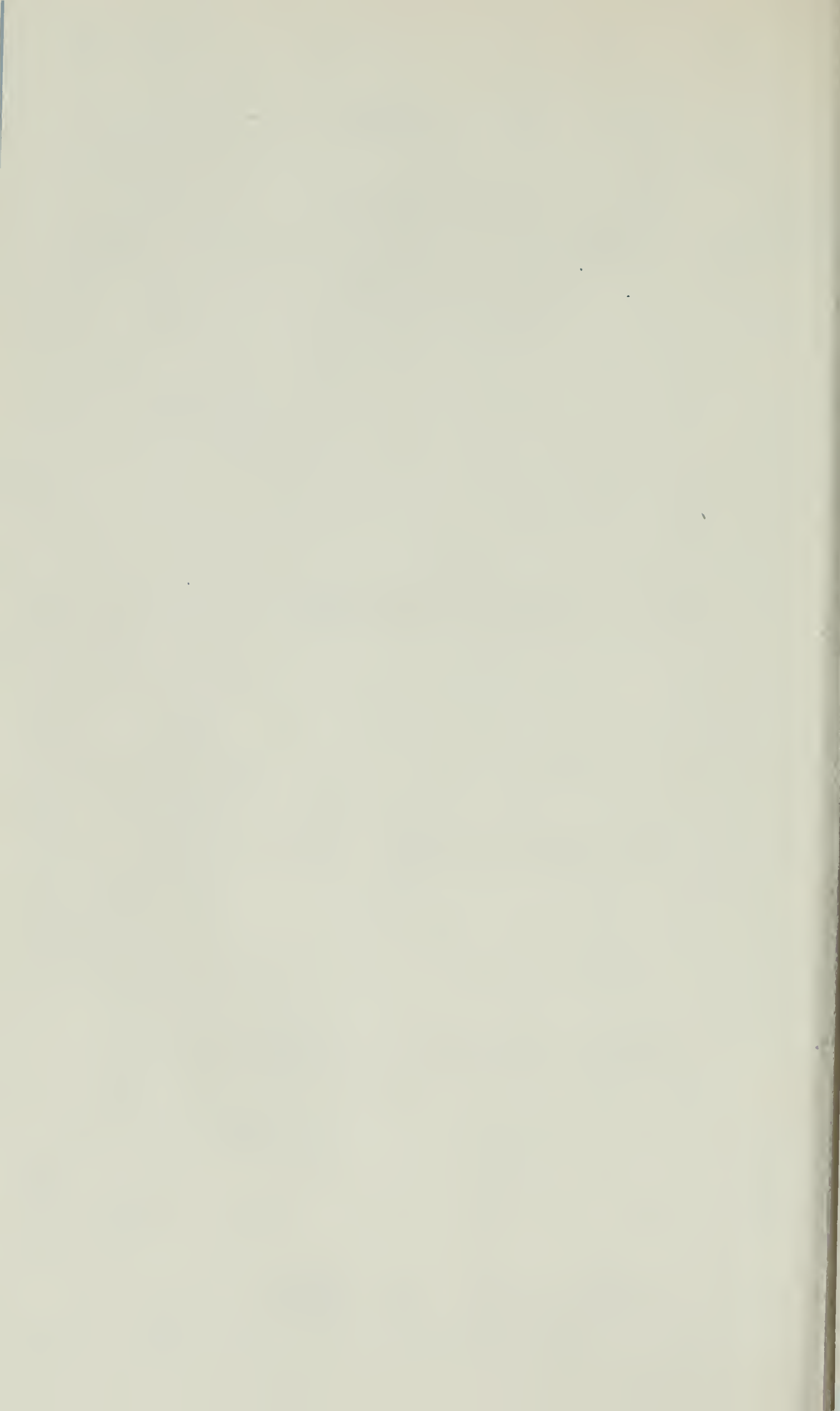

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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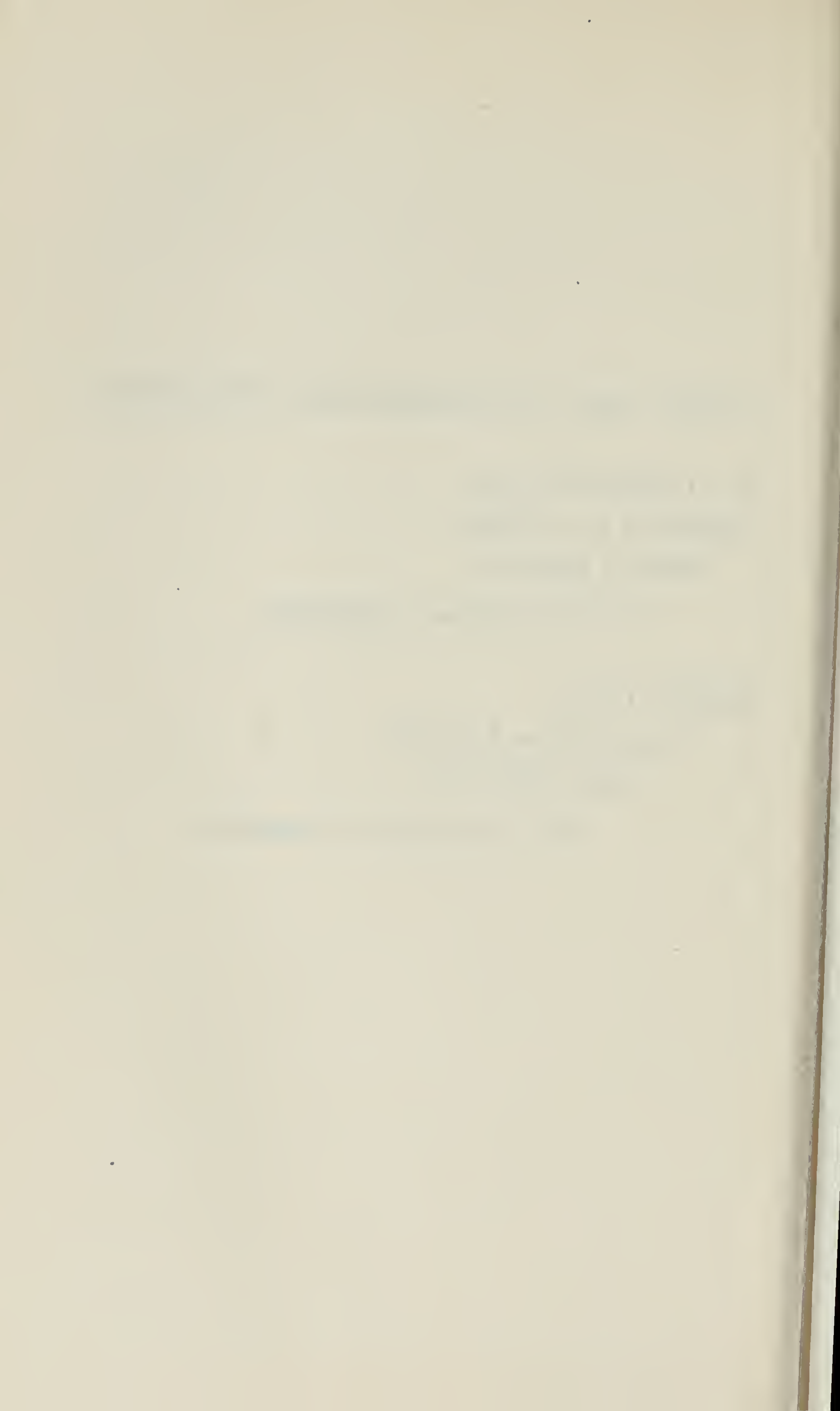
For Plaintiff and Appellant.

KREST CYR,
United States Attorney,
Butte, Montana,
For Defendant and Appellee.



In the District Court of the United States, District of Montana, Helena Division

Civil No. 524

HENRY THOL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff, and for cause of action alleges:

I.

That this is a suit of a civil nature, and the United States District Court in and for the District of Montana has jurisdiction under the provisions of Sections 1346 (b) and 2674, Title 28 U. S. Code.

II.

That at all of the times herein mentioned, the Helena National Forest was a national forest duly established and under the supervision and control of the Forest Service, of the Department of Agriculture of the United States; that at all of the times herein mentioned, the westerly boundary of a part of said national forest was formed by the channel of the Missouri River, flowing generally in a northerly and southerly direction in the Gates of the Mountains area, from Hauser dam to the northwest corner of Section 18, Township 13 N, Range 2 West, M.P.M., a distance of about ten

miles; that at all of the times herein mentioned that portion of said forest area east of said Missouri River, extended eastwardly for a distance of several miles and constituted a primitive or wild area and one of the roughest areas in Montana east of the Continental Divide; that at all of the times herein mentioned a gulch known as Meriwether Gulch arising in high mountain country in said Forest several miles to the northeast extended to the west and descended and opened into the Missouri River in Section 19, Township 13 N, R 2 West M.P.M.; that at all of the times herein mentioned to the north of said Meriwether Gulch, a similar gulch known as Mann Gulch, approximately a mile therefrom, descended to and opened into the Missouri River separated from Meriwether Gulch by a high ridge extending to the easterly bank of said river, where said ridge terminated in a cliff-like precipice; that at all of the times herein mentioned, a similar ridge extended and formed the northerly side of said Mann Gulch which ridge likewise extended to the Missouri River; that at all of the times herein mentioned, the top of the aforesaid ridge between Meriwether and Mann Gulches, and the area within the aforesaid Mann Gulch for a distance of from two to three miles from the river in an easterly direction was covered with a dense stand of Douglas Fir, and Ponderosa Pine poles six to eight inches in diameter with some larger timber, and a heavy ground cover in the openings and in the less dense timber, of grass and weeds; that on August 5, 1949, said timber and ground

covering was in an extremely dry and highly inflammable condition.

III.

That on or about the 5th day of August, 1949, a fire started at a point near the top of the aforesaid ridge between Mann Gulch and Meriwether Gulch, about one-half mile to the east of the Missouri River; that said fire was discovered by United States Forest Service employees, at 12:25 p.m. and was observed by them from the air at approximately 12:55 p.m. on said date, and at that time was estimated to be about eight acres in size, and smoking strongly; that thereupon the officers and employees of the United States Forest Service in charge of said Helena National Forest at Helena made a request of the United States Forest Service, Region One, at Missoula, Montana, for fire fighters, qualified to descend by parachute from an airplane near the site of a fire, called smoke jumpers, to proceed to the site of said fire by air in an effort to control the same; that thereupon an airplane with smoke jumpers aboard was dispatched by officers and employees of said United States Forest Service from Missoula, Montana, including one R. Wagner Dodge, Foreman in charge of said smoke jumpers, and one Earl E. Cooley, as fire spotter; that included among the smoke jumpers was Henry J. Thol, Jr., son of plaintiff; that said airplane arrived at the fire location at approximately 3:10 p.m.; that thereupon it became the duty of said spotter Cooley, and said Foreman Dodge, acting in

the course of their employment, and pursuant to the duties incident thereto as employees of the United States, to select from the air a safe area for said men to descend by parachute from said airplane where they would not be trapped by the spreading flames of said fire; that after their descent to the ground, at all of the times herein mentioned, all of said smoke jumpers were under the direction and control of said Foreman Dodge, and were acting in the course of their employment and pursuant to the duties incident thereto as employees of the United States.

IV.

That when said smoke jumpers were dispatched from Missoula, said defendant, by and through its officers and employees in said United States Forest Service in charge of said men knew of the extremely rough area where said fire was located, and knew that the fire danger was extremely high by reason of a high temperature of from 92 to 97 degrees Fahrenheit, low humidity, with wind directions and intensity variable, and a burning index of 74, with 100 as a maxmium which could be measured; that said defendant, by and through its officers and employees in said United States Forest Service likewise then and there knew that the said area where said fire was located was a primitive area without roads, and without habitations occupied by persons in the immediate area.

V.

That notwithstanding the matters and things

aforesaid said defendant, by and through its officers and employees carelessly, recklessly and negligently dispatched said group of smoke jumpers to the site of said fire, and carelessly, recklessly, and negligently directed fourteen smoke jumpers, including Henry J. Thol, Jr., son of plaintiff, to descend by parachute to the ground near said fire at about four o'clock p.m. on said date, although said defendant by and through its officers and employees knew, or in the exercise of reasonable care and diligence should have known by reason of the time of day, temperature, humidity, and variable direction of the wind, the highly inflammable condition of the ground cover and trees in said area, and general topography that upon descending in the aforesaid area said smoke jumpers might be trapped and burned by said fire.

VI.

That before said smoke jumpers were directed to jump from said airplane, said spotter Cooley and said foreman Dodge observed said fire from the air and determined the point at which said smoke jumpers should land; that said employees of the United States then and there estimated the size of the fire at between fifty and sixty acres, burning on the top of the ridge between Meriwether and Mann Gulches, and on the slope of the southerly side of said Mann Gulch; that said defendant, by and through said employees could not accurately determine the extent to which said fire had spread by reason of the smoke arising from said fire; that

said defendant, by and through said employees in charge of said smoke jumpers crew, then and there carelessly, recklessly, and negligently directed said smoke jumpers to jump from said airplane so as to alight in the bottom of said Mann Gulch at a point about one-half of a mile northeast of said fire, although said defendant, by and through said employees, did not then and there know the exact extent of said fire and then and there knew, or in the exercise of reasonable care and diligence should have known that by reason of the time of day, temperature, wind conditions, highly inflammable condition of the ground cover and trees in said area, the general topography, and the fire as observed from the air, that upon descending in said Mann Gulch above said fire as aforesaid, said smoke jumpers might be trapped and burned by said fire.

VII.

That the airplane by which said smoke jumpers were transported to the area of the fire as aforesaid was equipped with radio instruments designed to permit persons in said airplane to communicate by radio with United States Forest Service officials when said smoke jumpers had landed, so that the Forest Service officials in charge of the suppression of said fire could be advised of the presence of said smoke jumpers and their location; that said defendant by and through its officers and employees carelessly, recklessly and negligently failed and omitted to keep said radio equipment in said airplane in repair and permitted and allowed said airplane to

be dispatched when the radio equipment was out of repair so that it would not work and accordingly, the Forest Service officers and employees were not notified of the landing of said smoke jumpers until said airplane had returned to Missoula at about 5:15 p.m. on said date; that if said radio equipment had been in repair and working properly, officers and employees of said Forest Service who arrived near the site of the fire on the ground on the westerly side thereof would have known where said smoke jumpers were and would and could have warned said smoke jumpers of the danger of being trapped by said fire in sufficient time for them to have escaped.

VIII.

That upon making descent to the bottom of Mann Gulch as aforesaid, the fire-fighting equipment of said smoke jumpers was likewise dropped from said airplane by parachute, including a radio transmitter and receiver, which was broken by reason of the failure of the parachute, to which it had been attached, to open; that by reason of the premises said foreman in charge of said smoke jumpers was unable to communicate by radio with the Forest Service officials having charge of the suppression of said fire.

IX.

That after making the descent as aforesaid said foreman Dodge in charge of said crew knew or in the exercise of reasonable care and diligence should have known, that the general course of said fire

might be up said Mann Gulch toward the point where said men had landed by reason of the wind conditions, the draft conditions caused by the heat of the fire, the nature and inflammable condition of the ground cover and trees and the general topography, but nevertheless said defendant by and through said employee in charge of said crew carelessly, recklessly and negligently failed and omitted to take any steps to scout said fire and determine the rapidity with which it was spreading and the area to which it had spread, taking into consideration the fact that said crew could not communicate with Forest Service officials by radio and thus be advised as to the extent of said fire, and carelessly, recklessly and negligently directed and required said men to occupy themselves assembling the equipment and supplies which had been dropped by parachute from said airplane for a period of approximately one hour, from 4 o'clock to 5 o'clock p.m. on said date, during which time, by reason of the location of said crew in the bottom of said gulch, the direction of spread of said fire could not be ascertained; that said defendant by and through its employee in charge of said crew carelessly, recklessly and negligently failed and omitted to require a sufficient number of men to ascend to high points on the ridges on either side of Mann Gulch or to take such other appropriate steps as might be necessary to ascertain whether or not said fire was spreading easterly up said Mann Gulch toward said crew, as in the exercise of reasonable care and diligence said foreman would have done; that said

defendant by and through said foreman in charge of said crew then and there carelessly, recklessly and negligently failed and omitted to require said smoke jumpers to proceed to the top of the ridge on either the northerly or on the southerly side of Mann Gulch to avoid being trapped and burned by the oncoming flames which might rapidly spread from the west to the east up from the bottom of aforesaid Mann Gulch, as said defendant by and through said foreman in charge of said crew, then and there knew or in the exercise of reasonable care and diligence should have known; that by reason of the time of day, temperature, wind conditions, highly inflammable condition of the ground cover and trees in said area, a very high fire danger existed and a "blow-up" might occur at any time, causing the flames to spread with such rapidity that said crew of smoke jumpers landed in close proximity of said fire as aforesaid, could not escape therefrom, but nevertheless said defendant by and through its said employee carelessly, recklessly and negligently failed and omitted to direct said crew to a place of safety or to take any steps to ascertain the extent to which said fire had spread so that said crew could seek a place of safety as in the exercise of reasonable care and diligence would have been done.

X.

That said defendant, by and through its officers and employees carelessly, recklessly and negligently failed and omitted to properly instruct said smoke jumpers prior to their arrival and after arrival at

the scene of said fire as to their duties in the event of an emergency arising whereby they might be in imminent danger of being trapped by the flames of a rapidly spreading forest fire or as to the feasibility and possibility of setting a fire to burn off an area into which they might retreat to avoid being burned by a spreading forest fire; that said defendant by and through its officers and employees carelessly, recklessly and negligently failed and omitted to train and adequately instruct said smoke jumpers with respect to their duties in the event of imminent danger of being trapped by a forest fire, and permitted said smoke jumpers, and particularly the said Henry J. Thol, Jr., to be dispatched on said date without adequate training and experience with respect to the possibility of setting an escape fire to burn off an area into which they might escape to avoid being burned by a spreading forest fire.

XI.

That said defendant by and through said foreman Dodge after 5:00 p.m. on said date, carelessly, recklessly, and negligently led and directed said crew of smoke jumpers to proceed down the aforesaid Mann Gulch until they arrived in close proximity to said forest fire at a time when he was without knowledge as to where said fire had spread, after observing that said fire was burning and spreading rapidly, and at a time when said fire had entirely crossed said Mann Gulch and was proceeding up the same with great rapidity toward said smoke jumpers, as said defendant in the exer-

cise of reasonable care and diligence would have known in time to have led said men to a place of safety and not to a place where they might be trapped and burned by said fire.

XII.

That thereafter said foreman carelessly, recklessly and negligently required said smoke jumping crew to proceed down said Mann Gulch toward the Missouri River, and in a direction in closer proximity to said fire until approximately 5:45 p.m., although said defendant, by and through its said employee, in the exercise of reasonable care and diligence would have directed said crew to ascend the ridge on the northerly side of Mann Gulch while approaching said fire, where they could and would have had a position of safety from which they could escape from the flames of said fire, and carelessly, recklessly and negligently continued to so proceed until said crew could observe that the route toward the river was cut off by the advancing fire, at which time the approaching flames were about five hundred feet from them; that thereupon said foreman Dodge directed said crew to turn back and endeavor to escape from said flames by ascending the ridge on the northerly side of said Mann Gulch; that thereupon said foreman Dodge carelessly, recklessly and negligently failed and omitted to warn said crew and particularly the said Henry J. Thol, Jr., of his intention to do so, but nevertheless carelessly, recklessly, and negligently lit a fire to burn off an area into which said crew might

escape when said defendant, by and through said employee knew, or in the exercise of reasonable care and diligence should have known that such a fir, set without knowledge of said Henry J. Thol, Jr., would and did impede his escape from said forest fire.

XIII.

That said Henry J. Thol, Jr., endeavored to escape by ascending the ridge on the northerly side of Mann Gulch, but failed to reach a place of safety, and on the contrary was engulfed by the flames of the forest fire, or of the fire set by said foreman Dodge, and by reason thereof was severely burned, causing personal injuries resulting in his death on said date.

XIV.

That each of the aforesaid negligent acts and omissions of said defendant United States of America, acting by and through its officers and employees in the United States Forest Service as aforesaid, was a proximate cause of the injuries and subsequent death of said Henry J. Thol, Jr.

XV.

That at the time of his death as aforesaid, said Henry J. Thol, Jr., was a minor of the age of 19 years; that he resided with his father, Henry Thol, the plaintiff above named; that said Henry J. Thol, Jr., had an expectancy of over 42 years; that plaintiff was of the age of 68 years, with an expectancy of over nine years; and it was reasonably likely that his son would live beyond the period of plain-

tiff's expectancy; that said Henry J. Thol, Jr., was a kind and affectionate son; that he was earning, and capable of earning in excess of $200 a month, and it was reasonably likely that as he grew older his earning power would increase; that said Henry J. Thol, Jr., had made some contributions to plaintiff in the past from his earnings, and if he had not died by reason of said injuries as aforesaid, it is reasonably likely that he would have made further contributions to the plaintiff in the future; that by reason of the death of the said Henry J. Thol, Jr., plaintiff has suffered the loss of the comfort, society, and companionship of his son, and contributions toward his support.

XVI.

That by reason of the premises, plaintiff has suffered damages in the sum of $35,000.00.

Wherefore, plaintiff prays for judgment against said defendant in the sum of $35,000.00, together with his costs herein incurred.

/s/ WELLINGTON D. RANKIN,

/s/ ARTHUR P. ACHER,
Attorneys for Plaintiff.

[Endorsed]: Filed August 2, 1951.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the Defendant above named and moves the Court that this cause be dismissed upon the following grounds, to wit:

That the complaint herein fails to state a claim upon which relief can be granted.

/s/ DALTON PIERSON,
United States Attorney for the District of Montana;

/s/ R. LEWIS BROWN, JR.,
Assistant United States Attorney for the District of Montana;

/s/ H. D. CARMICHAEL,
Assistant United States Attorney for the District of Montana, Attorneys for Defendants.

[Endorsed]: Filed October 3, 1951.

In the United States District Court for the District of Montana, Helena Division

No. 524

HENRY THOL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER

The defendant's motion to dismiss having come on for hearing before the Court on the 7th day of

December, 1951, and the matter having been submitted to the Court upon briefs, and it appearing to the Court that under the provisions of Section 757 (b) of Title 5, U.S.C.A., the exclusive remedy of plaintiff herein is that provided by Chapter 15, Title 5, U.S.C.A.,

Now, Therefore, It Is Ordered that the defendant's motion to dismiss be, and the same hereby is, granted.

Done and dated this 12th day of June, 1953.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed and docketed June 12, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, that the Plaintiff above named, Henry Thol, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain order and final judgment entered in this action on the 12th day of June, 1953, in favor of the defendant, the United States of America, and against the plaintiff, Henry Thol, granting the defendant's motion to dismiss said action and from the whole of said order and judgment.

Dated this 10th day of August, 1953.

/s/ WELLINGTON D. RANKIN,
/s/ ARTHUR P. ACHER,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed August 11, 1953.

[Title of District Court and Cause.]

DOCKET ENTRY

Aug. 11, 1953—Mailed Copy Notice of Appeal to U. S. Attorney, Butte, Montana.

Attest a True Copy.

[Seal] H. H. WALKER,
Clerk

By /s/ ELIZABETH E. SPRINGER,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify that the annexed papers are the originals filed in Case No. 524, Henry Thol, Plaintiff, vs. United States of America, Defendant, and designated by the Plaintiff as the record on appeal in said cause.

Witness my hand and the seal of said Court at Helena, Montana, this 16th day of September, A.D. 1953.

[Seal] /s/ H. H. WALKER,
Clerk as Aforesaid.

[Endorsed]: No. 14,041. United States Court of Appeals for the Ninth Circuit. Henry Thol, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed September 19, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14,041

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA

Appellee.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

Statement of Points on Which Appellant Intends to Rely

The United States District Court erred:

1. In granting the defendant's motion to dismiss;

2. In holding that the complaint on file herein fails to state a claim upon which relief can be granted;

3. In finding, holding and deciding that under

the provisions of Section 757 (b) of Title 5, U.S.C.A., the exclusive remedy of plaintiff herein is that provided by Chapter 15, Title 5, U.S.C.A.;

4. In not finding, holding and deciding that the complaint states sufficient facts to authorize recovery by the plaintiff against the United States under the Federal Tort Claims Act, Section 2674, Title 28, U.S.C.A.

Designation of Record

The appellant hereby designates the following portions of the record to be printed as material to the consideration of the appeal, namely, Complaint, Defendant's Motion to Dismiss, the Order and Judgment of the Court granting the Defendant's Motion to Dismiss, Notice of Appeal with date of filing, Entry in Civil Docket as to names of parties to whom Clerk mailed copy of Notice of Appeal, Designation of Contents of Record on Appeal filed in the District Court, and this Statement of Points and Designation of Record, and requests that the Bond on Appeal not be printed nor the appellant's Statement of Points filed in the District Court, agreeable to Rule 75, Federal Rules of Civil Procedure, inasmuch as said statement is identical with the statement of points hereinbefore set forth.

Dated this 28th day of September, 1953.

/s/ WELLINGTON D. RANKIN,

/s/ ARTHUR P. ACHER,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 29, 1953.

No. 14041

United States Court of Appeals for the Ninth Circuit

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

Appeals from the United States District Court, for the District of Montana,

WELLINGTON D. RANKIN,
ARTHUR P. ACHER
Attorneys for Appellant

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In The
United States
Circuit Court of Appeals
for the Ninth Circuit

HENRY THOL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT

The Montana Case Cited Has No Application

Certain assertions in the Brief of the United States prompt this Reply Brief.

It is there stated: (P. 15)

> "Finally, there seems little doubt that if this case arose under the Montana Compensation Act, the non-dependent father could not recover for wrongful death. In Tarrant v. Helena Bldg. & Rlty. Co. (1944) 116 Mont. 319, 156 P. 2nd 168, suit was brought for the wrongful death in 1943 of a 13-year-old girl employed for $35.00 per month. The compensation Act was held to exclude the suit. It is true that the question of non-dependency was not expressly mooted, but the facts of non-dependency speak for themselves."

In the Tarrant case the suit was by the personal rep-

resentative of the decedent's estate. It was sought to avoid the Compensation Act by showing that decendent was a minor, illegally employed. The Court states:

> "Plaintiff was appointed as administratrix of the decedent's estate and, as such administratrix, brought this action to recover damages from the defendant Helena Building & Realty Company, a corporation, as owner and operator of the said office building on the alleged ground that its negligence was the proximate cause of the death."

The Court further stated:

> "No action for wrongful death existed at common law, the action dying with the injured person. However, the legislature is empowered to and it has provided that in certain cases the cause of action shall survive the death of the injured person.. (See sections 9075, 9076, and 9086, Rev. Codes.) That which the legislature is empowered to give, it is also empowered to take away. The legislature was empowered to enact the Workmen's Compensation Act. It was also empowered to enact the 1925 amendment to the Act. By such legislation the legislature *has taken from the injured workman, and in case of his death from his representatives,* certain cause of action and remedies theretofore available to them."

The Appellant Has Independent Rights as a Third Party

In Rocky Mountain Fuel Co. v. Industrial Commission, 105 Colo. 22, 96 Pac. 2d 413, the court said:

> "The Workmen's Compensation Act deals exclusively with matters growing out of the relation of employer and employee. The provisions of the act are binding upon employers and employees electing to be bound by them and upon none others. *All except employers and employees are strangers to the act, and their usual lawful rights and remedies are unaffected by it.*" (emphasis supplied.)

In Montana, of course, two independent causes of action would arise upon the death of a minor, excluding for the moment the effect of compensation laws. Thus in Burns v. Eminger, 84 Mont. 397, 405, 276 Pac. 437, the Court said:

> "In the case of an injury to a minor, there arise two causes of action—one in favor of the minor; the other in favor of the parents for loss of services during minority. In case of death, the action in favor of the minor survives and may be prosecuted by his administrator. (Melzner v. Northern Pac. Ry. Co., 46 Mont. 162, 127 Pac. 146; Burns, Admr., v. Eminger, above.) The independent action by the parent is authorized by section 9075, Rev. Codes of 1921 (Liston v. Reynolds, 69 Mont. 480, 223 Pac. 507).
>
> The recovery by a parent, as guardian ad litem of a living child, or as administrator of the estate in the surviving action, is no bar to a recovery by the parent in his own right for the damages which he has suffered by reason of the injury to his child."

We conceded in the opening brief that an action of the personal representative would be barred since the de-

cedent, if he had lived, would have been entitled to compensation. The Tarrant case goes no further.

Section 93-2809, authorizing the action by the parent for the death of his minor child was adopted from Section 376, California Code of Civil Procedure. The Montana Supreme Court held (1909) that "the construction given by the Courts of California and Washington meets with our approval." (Flaherty v. Butte Electric Ry. Co., 40 Mont. 454, 460, 107 Pac. 416.)

Durkee v. Central Pac. R.R. Co., 56 Cal. 388, 38 Am. Rep. 59, is cited by the Montana Court. There the court said:

> "It is, therefore, reasonable to presume, that the legislature had in view the principles of the common law as the same are applicable to cases of this character, and intended that the father should recover such damages as he has sustained, by way of compensation, leaving to the infant a further right of recovery of such damages as are personal to himself."

In Lange v. Schoettler (Cal) 47 Pac. 139, the court said:

> "It has been uniformly ruled that the action provided for in section 376, Code Civ. Proc., is a new action, and not the action which the deceased might have brought for the wrong had he survived."

The Tort Claims Act Should be Liberally Construed

In Gilroy v. United States (D.C.) 112 F. Supp. 664 the court said:

> "The purpose of the Federal Tort Claims Act was to abrogate the immunity of the United States against suit in tort. Its purpose was to make the United States liable to suit in tort in the same manner as anyone else. Unlike other statutes waiving governmental immunity, the Federal Tort Claims Act should be liberally construed in order to effectuate the purpose that was intended by its framers."

It is respectfully submitted that when the Federal Tort Claims Act was passed by Congress a cause of action arose in favor of a non-dependent father in Montana.

The question presented is whether or not the meaning of the exclusive liability provision of Section 757, Title 5 U.S.C. is so clear that the independent rights of a third party have been cut off.

It will be noted that the Supreme Court declined to pass upon the legal effect of similar language in the Longshoremen's and Harbor Workers' Act, in Halcyon Lines v. Haenn Ship C. & R. Corp., 342 U.S. 282, 96 L. Ed. 318, the court having stated:

> "Section 5 of the Act provides that, 'The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, ...' Haenn argues that this section provides the employer's exclusive liability thereby preventing a third party

from having any right of contribution against an employer under the Act in cases where the joint negligence of a third party and the employer injure an employee covered by the Act. *We find it unnecessary to decide this question* which is treated by the cases cited in note 3, supra." (emphasis supplied.)

Conclusion

The government's contention is supported by Underwood v. United States (CCA 10) (November 4, 1953) 207 F. (2d) 862, which is in conflict with Hitaffer v. Argonne Co. 87 App. D. C. 57, 183 F. (2d) 811 upon which we rely.

The United States Supreme Court denied certiorari in the Hitaffer case, 340 U.S. 852, 95 L. Ed. 624.

In Underwood v. United States, supra, the court states:

> "Viewed in the light of the declared purposes * * *it becomes unequivocally plain, we think, that Congress intended the liability of the United States with respect to the injury or death of an employee to be exclusive *and in the place* of all other liability of the United States, not only to the employee, his legal representative, spouse, dependent, and next of kin, but 'anyone otherwise entitled to recover damages from the United States.* * * on account of such injury or death* * * under any Federal Tort liability statute."

Upon the other hand in Hitaffer v. Argonne Co., Supra, the Court took a directly contrary view, saying:

> "Moreover, it would be contrary to reason to hold that this Act cuts off independent rights of third persons when the whole structure demonstrates that it is designed to compensate injured employees or persons suing in the employee's right on account of employment connected disability or death. It can

> hardly be said that it was intended to deprive third persons of independent causes of action where the Act does not even purport to compensate them for any loss."

In the Legislative history of the 1949 amendment, to the Federal Employees' Compensation Act, as we pointed out in our opening brief, it is stated that the purpose of the amendment is to make it clear that the right of compensation benefits under the Act is exclusive "and in place of" any and all other legal liability to the end that needless and expensive litigation "will be replaced" with measured justice.

"In place of" implies the existence of something for which a substitution is being made, (Vancleave v. Wolf (Ind) 190 N.E. 371.)

"Replace" means "to fill the place of; to supply the equivalent for" (United States v. Mallery (D. C. Wash) 53 F. Supp. 564.)

If the Government's contention is correct, the right of appellant, a non-dependent father, was not replaced, but was cut off.

It is respectfully submited that the appellants in the four cases now pending here are entitled to the independent judgment of this court as to whether or not they have a cause of action, or are without a remedy.

Respectfully submitted,
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